Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

VIVIAN INDUSTRIAL PLASTICS, INC.,

Petitioner,

versus

SHANNON MOORE, INDIVIDUALLY and BY NEXT FRIEND DONAL R. MOORE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Texas correctly applied federal pre-emption law in holding that the pre-emption provision of the Federal Boat Safety Act does not pre-empt state common law product liability claims, notwithstanding express Congressional intent to implement uniformity of safety standards for recreational vessels.

2. Whether federal pre-emption of non-identical state law pertaining to safety standards for recreational vessels and associated equipment creates a general, inherent conflict with state common law product liability suits against manufacturers of such vessels and equipment.

3. Whether the federal pre-emption provision of the Federal Boat Safety Act impliedly pre-empts state common law product liability claims based upon a policy decision by the federal regulatory agency not to adopt or impose a particular standard or requirement.

LIST OF ALL PARTIES AND RULE 29.1 NOTATION

The following are parties to this cause in the Supreme Court of Texas:

Shannon Moore, individually and by next friend Donal R. Moore. (Shannon Moore was a minor at the time this suit was originally filed. She has attained her majority while this suit has been pending.)

Brunswick Bowling & Billiards Corporation, Mercury Division.

Vivian Industrial Plastics, Inc.

There are no parent or subsidiary companies to be listed, in accordance with Supreme Court Rule 29.1, for Vivian Industrial Plastics, Inc., the corporation on behalf of which this petition is filed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES AND RULE 29.1 NOTATION ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS DELIVERED IN THE CASE 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 4

CONCLUSION 18

APPENDICES

APPENDIX A – Opinions and judgment of the Supreme Court of Texas and order on motion for rehearing ..... App. 1

APPENDIX B – Opinions and judgment of the Court of Appeals for the First District of Texas ..... App. 33

APPENDIX C – Interlocutory summary judgment and order granting motion for severance rendered by the District Court of Brazoria County, Texas, 23d Judicial District ..... App. 55

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983) 11

Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 60, 126 L.Ed.2d 30 (1993) 14

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) 11

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992) 17

CSX Transportation, Inc. v. Easterwood, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) 13

Chicago and N. W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) 16

Cipollone v. Liggett Group, Inc., 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) 4, 5, 13, 16

Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) 17

Gile v. Optical Radiation Corp., 22 F.3d 540 (3d Cir. 1994) 14

Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972) 13

Ingersoll-Rand Co. v. McLendon, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) 16

International Paper Co. v. Ouelette, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) 9

TABLE OF AUTHORITIES – Continued

Page

King v. Collagen Corp., 983 F.2d 1130 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993) 14

King v. E. I. Du Pont de Nemours & Co., 996 F.2d 1346 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. ___, 126 L.Ed.2d 440 (1993) 14

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990) 17

Morales v. Trans World Airlines, Inc., 504 U.S. ___, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) 8

Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993) 14

Mowery v. Mercury Marine, Div. of Brunswick Corp., 773 F.Supp. 1012 (N.D. Ohio 1991) 9, 10, 15

Norfolk & Western Railway Co. v. American Train Dispatchers' Association, 499 U.S. 117, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991) 15

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) 10, 12

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990), *cert. denied*, 498 U.S. 853, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990) 17

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988) 11

Shield v. Bayliner Marine Corp., 822 F.Supp. 81 (D. Conn. 1993) 15

TABLE OF AUTHORITIES – Continued

Page

Shields v. Outboard Marine Corp., 776 F.Supp. 1579 (M.D. Ga. 1991) 15

Slater v. Optical Radiation Corp., 961 F.2d 1330 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 327, 121 L.Ed.2d 246 (1992) 14

Stamps v. Collagen Corp., 984 F.2d 1416 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 86, 126 L.Ed.2d 54 (1993) 14

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990) 17

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d 732 (1983) 11

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1992) 10, 17

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 14

STATE CASES

Farmer v. Brunswick Corp., 607 N.E.2d 562 (Ill.App. 1992) 10, 15

Moore v. Brunswick Bowling & Billiards Corporation, 853 S.W.2d 842 (Tex. App. – Houston [1st Dist.] 1993) 1, 3

Moore v. Brunswick Bowling & Billiards Corporation, et al., 37 Tex. Sup. Ct. J. 693 (April 20, 1994) (not yet officially reported) 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. § 1257 2

28 U.S.C. § 2101(c) 2

33 C.F.R. 183 7

33 U.S.C. § 505(e) 9

46 U.S.C. § 4302(c)(3) 7

46 U.S.C. § 4302(c)(4) 6

46 U.S.C. § 4305 6

49 C.F.R. § 1.46 7

Airline Deregulation Act of 1978, 49 U.S.C. App. § 1301, *et seq.* 8

Clean Water Act, 33 U.S.C. § 1251, *et seq.* 9

Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b) 13

Federal Boat Safety Act, 43 U.S.C. § 4301, *et seq.* 3

Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301, *et seq.* 15

Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.* 14

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.* 14

Medical Device Amendments of 1976, 21 U.S.C. § 360k(a) 15

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.* 10, 12

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Moore v. Brunswick Bowling & Billiards Corporation, et al., 37 Tex. Sup. Ct. J. 693 (April 20, 1994) (not yet officially reported).

Moore v. Brunswick Bowling & Billiards Corporation, 853 S.W.2d 842 (Tex. App. – Houston [1st Dist.] 1993).

STATEMENT OF JURISDICTION

The opinion and judgment of the Supreme Court of Texas were rendered on April 20, 1994. Thereafter a

motion for rehearing was timely filed and denied by that Court on June 22, 1994. This petition for writ of certiorari was filed within 90 days of the date of denial of the petition for rehearing, as required by 28 U.S.C. § 2101(c) and Supreme Court Rule 13.4. Jurisdiction is invoked under the provisions of 28 U.S.C. § 1257.

STATUTE INVOLVED

The "pre-emption clause" of the Federal Boat Safety Act, 46 U.S.C. § 4306, reads as follows:

> **§ 4306. Federal Pre-emption**
>
> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The "savings clause" of the Act, 46 U.S.C. § 4311(g), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

STATEMENT OF THE CASE

This is a suit for damages for personal injuries arising out of an accident involving a recreational vessel. Respondent Shannon Moore was swimming in the San Bernard River in Brazoria County, Texas, when she was struck by the propeller of a motorboat. The boat was manufactured by Petitioner Vivian Industrial Plastics, Inc. (V.I.P.) and was equipped with an outboard motor manufactured by Brunswick Bowling & Billiards Corp., Mercury Division (Mercury). In addition to suing the owners and operators of the boat for their alleged negligence in causing this accident, Respondent brought suit against V.I.P. and Mercury under theories of negligence and strict liability, contending that the boat and motor were defective in design because the motor's propeller was not equipped with a guard.

Petitioner V.I.P. and Mercury moved for summary judgment in the trial court on the ground that Respondent's product liability claim against them was pre-empted by the Federal Boat Safety Act (FBSA), 43 U.S.C. § 4301, *et seq.* The trial court granted the motion and severed Respondent's claims against these defendants so as to make the judgment in their favor final. Respondent appealed to the Court of Appeals for the First District of Texas at Houston, which affirmed the judgment, agreeing that Respondent's claims were pre-empted. 853 S.W.2d 842.

The Supreme Court of Texas granted Respondent's application for writ of error, reversed the judgments of the lower courts, and ordered the cause remanded for trial. With three justices dissenting, that court held that

pre-emption clauses must be narrowly construed and, in the absence of "clear and manifest" intent of Congress, a prohibition against any inconsistent state "law or regulation" should not be read so broadly as to include state common law damages suits. The majority concluded that since the pre-emption clause of the FBSA did not explicitly refer to common law, it could be inferred that Congress did not mean to pre-empt all state law tort actions, and that Respondent's claims are expressly preserved under the language of the "savings clause" of the Act.

ARGUMENT

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), this Court most recently considered the pre-emptive effect of federal statutes upon state common law suits, holding that federal cigarette labeling and advertising statutes pre-empt some but not all state law damages claims with respect to cigarette smoking. However, unlike *Cipollone*, where the Court found "no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions", 120 L.Ed.2d at 424, this case presents a situation in which Congress has enacted a regulatory scheme which is subject to serious interference or undermining by common law damages suits. The Supreme Court of Texas has resolved this case by applying a "presumption against pre-emption" for the purpose of determining, not the Congressional intent behind the legislation's pre-emption provision, but whether state common law actually conflicts with the federal statute. In the process, that Court

has embraced a precept apparently disapproved by this Court in *Cipollone, i.e.,* that a federal statutory pre-emption of inconsistent state "law" or "regulations" or "requirements" does not impliedly pre-empt the "indirect regulatory effect" of state common law tort liability. 120 L.Ed.2d at 425-426. Also, the Supreme Court of Texas has given unprecedented consideration to the interest of the State of Texas in enforcing its own laws as a factor in ascertaining Congressional intent to pre-empt state law. The effect of the strict construction given to the pre-emption clause of the FBSA by the Supreme Court of Texas is to contravene the plainly expressed Congressional intent to promote national uniformity in the regulation of boating safety.

The Federal Boat Safety Act was promulgated "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333. The legislative history accompanying the FBSA indicates Congress' determination that uniformity is necessary to achieve the goals of the Act: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." 1971 U.S.C.C.A.N. at 1335. To promote the objective of uniformity, a pre-emption clause was included in the Act. The legislative objective of maintaining uniformity in standards at the national level is evident in the legislative

history of the FBSA, which contains the following comment on Section 4306, the federal pre-emption clause:

> This section provides for federal pre-emption in the issuance of boat and equipment safety standards. This conforms to the long history of pre-emption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

S. Rep. No. 248, 92d Cong. 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1341.

Section 4302 of the FBSA authorizes the establishment of uniform standards for the design, construction, materials and performance of boats and all associated equipment. Exclusive authority for granting an exemption to such requirements is conferred upon the Secretary. 46 U.S.C. § 4305. The legislative history indicates that the purpose is "to ensure that indiscriminate use of State authority does not seriously infringe on the basic need for uniformity." S. Rep. No. 248, 92d Cong. 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. at 1341.

The Act requires the Secretary to consult with the National Boating Safety Advisory Council, concerning the need for regulation and the extent to which it will enhance recreational vessel safety, before prescribing regulations establishing safety standards under the Act. 46 U.S.C. § 4302(c)(4). Issuance of a regulation pursuant to the Act compelling substantial future alteration of a vessel or a piece of associated equipment must be preceded by a determination of the Secretary, with the help of the

Advisory Council, that such regulation is necessary to avoid a substantial risk of personal injury to the public. 46 U.S.C. § 4302(c)(3).

The Secretary of Transportation has delegated the powers and duties under the Act to the Commandant of the Coast Guard. 49 C.F.R. § 1.46. Pursuant to this delegation of authority, the Coast Guard has promulgated regulations pertaining to boats and associated equipment. 33 C.F.R. 183. In 1988, the Coast Guard instructed the Advisory Council to investigate the feasibility of requiring guards to prevent underwater propeller accidents. The Advisory Council appointed a "Propeller Guard Subcommittee" to conduct this study. The Subcommittee, after receiving evidence and expert testimony concerning the matter, submitted a report on November 7, 1989 recommending that "the U. S. Coast Guard should take no regulatory action to require propeller guards." In support of this recommendation, the Subcommittee detailed several conclusions: (1) that current propeller guards can be "counter-productive and can create new hazards of equal or greater consequence"; (2) that no universal design is presently available, making the costs of retrofitting the millions of boats in this country prohibitive; and (3) that the boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities."[1] The Coast Guard's

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[1] The Report of the Propeller Guard Subcommittee was included in the summary judgment proofs considered by the trial court. Findings detailed in the report are cited in both the majority and dissenting opinions of the Supreme Court of Texas. [App. 6, 18-19]

Advisory Council approved the Subcommittee's report and accepted all of its recommendations.[2] The Coast Guard adopted the position that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats," since a guard fitting all types of boats was not then feasible and the costs of retrofitting millions of boats was a major economic consideration. The Coast Guard indicated that it would continue to monitor propeller guard accident data and any improvements in the relevant technology.

The Supreme Court of Texas places emphasis in its opinion upon the savings clause of the FBSA, as demonstrating that "Congress meant less than what it said" in the pre-emption clause since there is no explicit reference to common law in the pre-emption clause. [App. 9-10] A similar contention was rejected by this Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), in its interpretation of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1301, *et seq.* That Act contains a pre-emption clause that does not explicitly refer to state common law and a savings clause that does make such express reference. 49 U.S.C. App. §§ 1305(a)(1), 1506. Nonetheless, this Court held that state common law claims were pre-empted, since a "general remedies saving clause cannot be allowed to supersede the specific substantive pre-emption provision." 119

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[2] *See* letter from Robert T. Nelson, Rear Admiral U.S. Coast Guard, Chief, Office of Navigation and Waterway Services, to Mr. A. Newell Garden, Chairman (February 1, 1990), also included in the summary judgment proofs and cited in the opinion of the Supreme Court of Texas. [App. 6]

L.Ed.2d at 168. Similarly, in *International Paper Co. v. Ouelette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987), this Court considered the two savings clauses in the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, one of which specifically referred to common law. 33 U.S.C. § 505(e). The Court said that consideration of the Act "as a whole, its purposes and history" indicated a Congressional intent to devise a regulatory system that sets clear standards, which would be subject to serious interference or undermining by common law suits. The Court concluded that it should not construe a general savings clause in such a way as to undermine the statutory scheme or to subvert the legislative intent. 479 U.S. at 493-494.

By contrast, the reading of the FBSA's savings clause by the Supreme Court of Texas has the effect of undermining the Congressional intent to invoke uniformity as necessary to achieve the goals of the Act. The inevitable result of tolerating common law liability of manufacturers who are subject to regulatory provisions of the FBSA would be to permit the States to "do indirectly what they could not do directly". *International Paper, supra*, 479 U.S. at 495.

A reasonable interpretation of the FBSA's savings clause, as a part of the whole statutory scheme, is that a manufacturer's compliance with the minimum safety standards set forth in the FBSA does not afford a defense against liability for products which are defectively designed or manufactured as installed. This was the interpretation adopted by the Court in *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F.Supp. 1012 (N.D. Ohio 1991), in which the Court gave the following illustration:

> "Defendants could not raise as a defense that they had no duty [under the FBSA] to install a propeller guard *if they were to install a defectively or unreasonably dangerous propeller guard.* In such a case, the savings clause would apply to preserve plaintiff's claim. This is distinguishable from exercising their federally granted choice not to install a propeller guard."

773 F.Supp. at 1017 n.9 (emphasis in original). *See also*: *Farmer v. Brunswick Corp.*, 607 N.E.2d 562, 567-568 (Ill.App. 1992) (the savings clause would preserve a plaintiff's claim based on a manufacturer's installation of a defective or unreasonably dangerous propeller guard). An analogy is found in decisions by the lower federal courts involving the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.*, which pre-empts state safety standards and contains a savings clause providing that compliance with the prescribed federal standard does not exempt a person from common law liability. While this statute clearly has the effect of pre-empting common law actions premised upon a manufacturer's failure to install air bags, nonetheless a manufacturer may be liable if it installs an air bag which is defective. *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 782 (1992).

As pointed out by the dissenting opinion, the holding of the Supreme Court of Texas does not accord proper significance to the Coast Guard's affirmative decision to leave the subject of propeller guards unregulated. [App. 16-19] The majority opinion dismisses this consideration on the basis that, since the Coast Guard has not passed a

regulation on the subject of propeller guards, there is no conflict with federal law inherent in judicial imposition of liability for failing to install propeller guards. [App. 12-13] This Court has held that "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision to regulate." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983). To similar effect are the opinions in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 422, 106 S.Ct. 709, 88 L.Ed.2d 732 (1983); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988); and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-52, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989).

In the present case, the decision *not* to regulate reflects an affirmative policy decision by the regulatory agency that a regulation mandating propeller guards is not warranted at this time. The Coast Guard, in adopting the subcommittee's recommendation that it take "no regulatory action to require propeller guards", specifically stated that propeller guards should not be mandated because of the lack of a feasible universal propeller guard and the economic costs that would attend any such requirement. Therefore, notwithstanding the rationale offered by the Supreme Court of Texas, it is apparent that state common law claims subjecting a manufacturer to liability for failure to utilize such equipment would effectively create a safety standard in direct conflict with the enforcing agency's determination that such equipment

should not be required. Such a result is not only inconsistent with the FBSA's goal of uniformity of safety standards, but it is also impliedly pre-empted by virtue of a specific policy decision of the Coast Guard pursuant to authority delegated to it by Congress.

A similar statutory scheme for a uniform system of product safety regulations is found in the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, *et seq.* Pursuant to the regulatory authority delegated by that statute, the Secretary of Transportation made a conscious decision not to mandate air bags but rather to give manufacturers the choice to install either air bags or seat belts. Four federal circuit courts of appeals have determined that common law damages awards based on a failure to install air bags would conflict with the Act, and therefore were pre-empted by it, because they would have the effect of creating a requirement of such equipment notwithstanding the determination of the federal agency that such a requirement was inappropriate. *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), and cases cited at 1265-66.

The opinion of the Supreme Court of Texas embraces the precept that there is a "presumption against pre-emption" which militates against construing a statutory provision pre-empting state law to include state common law claims in the absence of a "clear and manifest" expression of Congress' intent to that effect. [App. 7-9] This precept is contrary to principles of federal pre-emption law enunciated by this Court and consistently followed by the federal courts of appeals.

This Court has, in numerous contexts, recognized that broad statutory references to "state law" are intended to be inclusive of the common law of the state. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). Most recently, in *Cipollone, supra*, this Court construed the pre-emption clause of the 1969 Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b), which reads as follows:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

This Court concluded that the legislative intent of this statutory language was the pre-emption of state common law claims based upon a cigarette manufacturer's failure to warn of dangers associated with the use of its product. The statutory language of the above-quoted provision, referring to any "requirement or prohibition * * * under State law" is analogous to the language of Section 4306 of the FBSA pre-empting a State "law or regulation * * * imposing a requirement" not identical to a regulation prescribed under the FBSA. In *Cipollone*, this Court found that the language of the pre-emption clause prohibiting a "requirement" of state law reflected Congressional intent to pre-empt common law claims sufficiently to overcome any "presumption against pre-emption". 120 L.Ed.2d at 425-426.

In reliance upon *Cipollone*, seven federal circuit courts of appeals have held that common law damages

awards constitute a form of state regulation which is included within a statute's express provision for the pre-emption of state law "requirements".

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993), *King v. E. I. Du Pont de Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. ___, 126 L.Ed.2d 440 (1993), and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 60, 126 L.Ed.2d 30 (1993), addressed the matter of pre-emption under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, in holding that the statutory prohibition of other and different state law "requirements" with respect to product labeling effectively pre-empted any labeling-based negligence claim arising out of duties imposed by state common law.

Moss v. Parks Corp., 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2999, 125 L.Ed.2d 693 (1993), construed the Federal Hazardous Substances Act, 15 U.S.C. § 1261, *et seq.*, with a pre-emption clause prohibiting any State from imposing a "requirement" for labeling different from that prescribed under the Act, as precluding state tort law actions based on failure to warn theories.

Stamps v. Collagen Corp., 984 F.2d 1416 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 86, 126 L.Ed.2d 54 (1993); *Gile v. Optical Radiation Corp.*, 22 F.3d 540 (3d Cir. 1994); *King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993); and *Slater v. Optical Radiation Corp.*, 961 F.2d 1330 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 327, 121

L.Ed.2d 246 (1992), construed the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301, *et seq.*, particularly the provisions of the Medical Device Amendments of 1976, 21 U.S.C. § 360k(a), pre-empting any State law "requirement" with respect to product design characteristics, as pre-empting product liability actions arising under state common law.

The holding of the Supreme Court of Texas also conflicts with that of the four courts that have specifically considered the pre-emption of state law tort actions under the FBSA based on the failure to install propeller guards. Three cases decided by lower federal courts, *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579 (M.D. Ga. 1991); and *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991); as well as one intermediate appellate state court, *Farmer v. Brunswick Corp.*, 607 N.E.2d 562 (Ill.App. 1992), have held that the FBSA pre-empts common law damages claims.

The opinion of the Supreme Court of Texas draws a distinction between the pre-emption of positive law and the pre-emption of state common law on the basis that the regulatory effect of common law liability is less direct than that of a statutory requirement. [App. 12-14] This proposition is analogous to one expressly rejected by this Court in *Norfolk & Western Railway Co. v. American Train Dispatchers' Association*, 499 U.S. 117, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991), disapproving of an interpretation of the phrase "all other law, including State and municipal law", which would make a distinction "between positive enactments and common law rules of liability." 499 U.S. at 128. Furthermore, the suggestion of the opinion of the

Supreme Court of Texas that a strict construction against pre-emption of state common law is appropriate because the "incidental regulatory pressure" of state common law actions is acceptable when direct state regulatory authority is not, was expressly rejected by a majority of this Court in *Cipollone*. Both the opinion of the Court delivered by Justice Stevens and the separate opinion authored by Justice Scalia in *Cipollone* recognize that the effect of common law liability, even though not as direct as that of positive enactments, is nonetheless an imposition of state law requirements, since "it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions*." 120 L.Ed.2d at 426. In *Chicago and N. W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), and in *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), this Court noted that state courts' exercising their common law powers to develop their own version of reasonable requirements, may result in different substantive standards, requiring the tailoring of conduct to the peculiarities of the law of each jurisdiction. This outcome is fundamentally inconsistent with the legislative intent to implement uniformity of standards. *McLendon*, 498 U.S. at 142.

The Supreme Court of Texas also grounds its opinion in part on what it describes as a "significant state interest at issue", *i.e*, the "decided interest" of the State of Texas "in providing compensation and relief for its citizens who are injured on its waterways." [App. 11] The Court states that consideration of this state interest requires that "Congress must demonstrate its intent to pre-empt such

remedies in clear and certain terms." However, "the relative importance to the State of its law is not material when there is a conflict with a valid federal law [because] any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). In this respect, the majority opinion of the Supreme Court of Texas has mistakenly applied a "presumption against pre-emption", not to determine whether state common law is pre-empted by the FBSA but rather to decide the question of whether there is a conflict between state law and federal law. "[N]o such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights." *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), *cert. denied*, 498 U.S. 853, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

CONCLUSION

The opinion and disposition of this case by the Supreme Court of Texas is inconsistent with principles of federal pre-emption law as enunciated in several opinions of this Court and as applied in many cases by the federal courts of appeals. The case is worthy of this Court's review because the present result is an opinion of a State court of last resort which effectively undermines the plain legislative intent of Congress to establish a nationally uniform system of safety regulations for recreational vessels and equipment. Further, the case presents an important issue of federal pre-emption law relating to the effect upon state common law product liability suits of a federal agency's determination, in the exercise of its statutory discretion, *not* to regulate or impose specific requirements upon manufacturers.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. D-3997

SHANNON MOORE, INDIVIDUALLY AND BY NEXT FRIEND, DONAL R. MOORE, PETITIONERS

v.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, INDIVIDUALLY AND DBA MERCURY OUTBOARD MOTORS AND/OR MERCRUISER; AND VIVIAN INDUSTRIAL PLASTICS, INC., INDIVIDUALLY AND DBA V.I.P. BOATS, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued February 15, 1994

JUSTICE CORNYN delivered the opinion of the Court, in which JUSTICE GONZALEZ, JUSTICE DOGGETT, JUSTICE GAMMAGE, JUSTICE SPECTOR, and JUSTICE ENOCH join.

This case presents the question of whether the Federal Boat Safety Act, 46 U.S.C. §§ 4301-4311, preempts a state law tort claim that a boat was defective because it lacked a propeller guard. We hold that such claims are neither expressly nor impliedly preempted by the Act. Therefore, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

On May 4, 1986, Petitioner Shannon Moore was swimming in the San Bernard River in Brazoria County when she was struck by the propeller of a motorboat. The

boat was manufactured by Respondent Vivian Industrial Plastics, Inc., (V.I.P.), and contained a motor and drive unit manufactured by Respondent Brunswick Bowling & Billiards Corp., Mercury Division (Mercury). Shannon suffered injuries to her right arm from the propeller, which was not equipped with a guard. Donal Moore, as Shannon's next friend,[1] sued Mercury and V.I.P. in state district court under theories of negligence and strict liability.[2] Moore contended that the motor was defectively designed because it did not include a propeller guard. Mercury moved for summary judgment on the grounds that Moore's products liability suit was preempted by the Federal Boat Safety Act. The trial court granted Mercury's motion, stating in its order that Moore's claims were preempted by federal law. To serve judicial economy, the parties agreed that summary judgment should also be rendered on Moore's identical claims against V.I.P., without the necessity of V.I.P. filing a separate motion. The trial court then granted Mercury and V.I.P.'s motion for severance, whereupon the summary judgment became final for the purposes of appeal. The court of appeals affirmed, agreeing that Moore's claims were preempted. 853 S.W.2d 842.

The doctrine of federal preemption is rooted in the supremacy clause of Article VI of the United States Constitution, which states that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in

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[1] At the time of the accident, Shannon Moore was a minor. She attained her majority while this suit was pending.

[2] Moore also sued the owners and operators of the boat, who are not parties to this appeal.

the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus a state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). The "ultimate touchstone" of preemption analysis is congressional intent. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Federal law may supersede state law in different ways. Congress may explicitly state its intent to preempt in the language of a federal statute. *See Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985). Preemption may be presumed when federal legislation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or touches a "field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, state law is preempted to the extent it actually conflicts with federal law. State law conflicts with federal law when it is impossible to comply with the law of both, *see Hillsborough*, 471 U.S. at 713, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). The term "federal law" in this context includes regulations as well as statutes. *See Hillsborough*, 471 U.S. at 713.

To determine whether state law is preempted in this case, we must first examine the history, purpose, and language of the Federal Boat Safety Act. The Act was

originally promulgated "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation."[3] S.REP.NO. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. Before prescribing regulations establishing safety standards under the Act, the Secretary must consult with the National Boating Safety Advisory Council concerning the need for the regulation and the extent to which it will enhance recreational vessel safety. 46 U.S.C. § 4302(c)(4). To pass a regulation compelling substantial future alteration of a vessel or piece of associated equipment, the Secretary must first determine, with the help of the Advisory Council, that the regulation is necessary to avoid a substantial risk of personal injury to the public. 46 U.S.C. § 4302(c)(3).

The legislative history indicates Congress' belief that uniformity was necessary to achieve the goals of the Act: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." 1971 U.S.C.C.A.N. at 1355.[4] The language of the Act also reflects this desire for

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[3] The Secretary of Transportation has delegated the powers and duties under the Act to the Secretary of the Coast Guard. *See* H.R. REP. NO. 338, 98th Cong., 1st Sess. 122-23 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 934-35; H.R. REP. NO. 154, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2361, 2363.

[4] *See also* Andrew W. Anderson & F. David Famulari, *Practice Guide: Pleasure Boats*, 4 U.S.F. MAR. L.J. 99, 105 (1992) ("The

some degree of uniformity. Section 4306, entitled "Federal Preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The Act also contains a "savings clause" in § 4311(g), which provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

Mercury[5] contends that Moore's claims are expressly preempted by the combination of § 4306 and the Coast Guard's decision not to mandate propeller guards through regulation, as evidenced by a Coast Guard

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purpose of the Act was to standardize the regulations applicable to the manufacture of recreational vessels and to establish uniform standards for recreational vessel numbering and safety equipment.").

[5] Although V.I.P. did not file a brief with this court, at oral argument Mercury's counsel stated that he also represented the interests of V.I.P.

report. In 1988, the Secretary of the Coast Guard instructed the Advisory Council to investigate the feasibility of requiring guards to prevent underwater propeller accidents, and the Council subsequently appointed a "Propeller Guard Subcommittee." The Subcommittee recommended that "the U.S. Coast Guard should take no regulatory action to require propeller guards," concluding that (1) current propeller guards can be "counterproductive and can create new hazards of equal or greater consequence," (2) no universal design is presently available, making the cost of retrofitting the millions of boats in this country prohibitive, and (3) "the boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities." *See* Report of the Propeller Guard Subcommittee, at 20-24 (November 7, 1989). The Advisory Council approved the report, and the Coast Guard accepted all of the Subcommittee's recommendations. *See* Letter from Robert T. Nelson, Rear Admiral U.S. Coast Guard, Chief, Office of Navigation and Waterway Services to Mr. A. Newell Garden, Chairman, 1 (February 1, 1990). The Coast Guard's stated position was that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats," noting that a guard fitting all types of boats was not then feasible and that the cost of retrofitting millions of boats was a major economic consideration. The Coast Guard agreed to continue to monitor propeller guard accident data and any improvements in propeller guard technology. *Id.*

The crux of Mercury's argument is that the term "law or regulation" in the § 4306 preemption clause encompasses common-law tort claims because jury awards of damages have a regulatory effect by requiring defendant companies to install propeller guards upon threat of liability.[6] Mercury posits that such awards would not only not be "identical" to the Coast Guard's policy decision not to mandate guards or regulations concerning guards, but also would create a direct conflict with that decision. Moore argues that her claims are expressly preserved under the plain language of the savings clause in § 4311(g).

When determining whether such an express preemption clause indeed preempts state law, we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Cipollone*, 112 S. Ct. at 2617 (quoting *Rice*, 331 U.S. at 230). The purpose of such a presumption is to provide "assurance that the 'federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. The Rath Packing Co.*, 430 U.S. 519, 525

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[6] Mercury assumes, of course, that plaintiffs will prevail on their claims that motors without guards were defectively designed. To determine whether a product was defectively designed, the jury must balance the utility of the product against the likelihood and gravity of injury from its use. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979). Our holding that Moore's claim is not preempted does not prevent either party from presenting its own evidence of the technological and economic feasibility of a propeller guard. *See Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980).

(1977). This presumption against preemption particularly obtains when, as in this case, state regulation of health and safety matters is involved. *See Hillsborough,* 471 U.S. at 715. Mercury contends that the plain language of § 4306 indicates that common law suits not identical to federal regulations are preempted. We recognize that the term "law" can include both common law and statutory law. However, in *Cipollone,* the Supreme Court stated generally that "the presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." 112 S. Ct. at 2620-21. We also recognize that jury awards can have an effect akin to regulation. *See Cipollone,* 112 S.Ct. at 2620 ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.") (quoting *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)). However, this regulatory effect is not as direct as that of positive enactments. *See Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185-86 n.8 (1988) (stating that Congress may reasonably determine in a given case that the "incidental regulatory pressure" of state common-law actions is acceptable when direct state regulatory authority is not); *English v. General Elec. Co.,* 496 U.S. 72, 85 (1990) (holding that the regulatory effect of petitioner's state common-law claims was "neither direct nor substantial enough" to place them within the preempted field). We conclude that the precepts that preemption clauses must be narrowly construed and that Congress' intent to preempt must be "clear and manifest"

counsel us to decline to read "law or regulation" so broadly as to include state common-law claims. *See English*, 496 U.S. at 79; *see also* Alan J. Lazarus et al., *Products, General Liability, and Consumer Law: Annual Survey of Recent Developments*, 28 TORT & INS. L.J. 354, 365-66 (1993) ("The lessons of *Cipollone* are that the preemption defense will be applied narrowly, that preemptive language of a statute or regulation will be interpreted strictly, and that few state-law damage claims will be preempted.").

An additional factor militating against reading the term "law or regulation" so broadly is that in other enactments Congress has explicitly referred to state common law when it meant to include it within the scope of a preemption clause. *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d),18(e) (1989) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law").

The existence of the savings clause also buttresses our construction of § 4306. Section 4306 must be read in conjunction with § 4311(g).[7] Section 4311(g) demonstrates

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[7] In *Cipollone*, the Court construed the phrase "requirement or prohibition under state law" in the Federal Cigarette Labeling and Advertising Act's preemption clause to include some common law claims. 112 S.Ct. at 2621. The statute at issue in

not only that Congress knew how to explicitly refer to common law when it so desired, but also that Congress did not mean to preempt all state tort law actions under § 4306. Mercury urges that we read § 4311(g) narrowly to expressly preserve common-law claims based only on state regulations and statutes that are identical to federal ones. *See Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1582 (M.D. Ga. 1991). Such a construction would render the savings clause redundant, because even assuming that § 4306 applies to common-law actions, it would not bar an action establishing a standard "identical" to a federal standard. Mercury also urges that § 4311(g) preserves claims concerning safety areas which the federal government has not addressed. While this reading is more plausible, we find no basis in the language of the statute or legislative history for such a narrow construction.[8]

Cipollone, however, did not contain a savings clause; consequently the Court had "no 'good reason to believe' that Congress meant less than what it said," *Id.* at 2620. The Court also based its broad reading of the clause's language on the legislative history of the Act: when Congress amended the Act in 1969 it added "obviously broader language" that "extended . . . [the] pre-emptive reach" of the original preemption clause. *Id.* at 2621.

[8] Similarly, we reject the reasoning behind the court of appeals' distinction of *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988), and *Rubin v. Brutus Corp.*, 487 So. 2d 360 (Fla. Dist. Ct. App. 1986). The court read these cases as holding that § 4311(g) prevents a manufacturer from using compliance with the minimum safety standards set forth in the Federal Boat Safety Act as a defense against liability for defectively designed safety products that are "actually installed." 852 S.W.2d at 845-46. Such a reading of § 4311(g) is not consistent

Our holding that preemption should not be lightly inferred in this case rests in part on the significant state interest at issue. The State of Texas has a decided interest in providing compensation and relief for its citizens who are injured on its waterways. This interest is particularly acute because the Federal Boat Safety Act does not provide compensatory remedies. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (stating that the lack of evidence of congressional intent to bar state common-law remedies "takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct").[9] Given this state interest, Congress must demonstrate its intent to preempt such remedies in clear and certain terms. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.").

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with the court of appeals' determination that "law or regulation" includes common-law actions. If common-law actions are encompassed by § 4306, then tort actions like those in *Rubin* and *Mulhern* would still create standards not "identical" to federal regulations.

[9] The Federal Boat Safety Act provides for civil penalties to be paid to the federal government and permits the Attorney General to file suits seeking an injunction. *See* § 4311(a)-(f).

Mercury urges that a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated. Mercury points to cases holding that the failure to regulate can have the same preemptive effect as a decision *to* regulate. *See, e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). We recognize this potential for conflict, but do not think it justifies a holding of preemption.[10] It is arguable that the Coast Guard's

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[10] In this respect, Mercury's argument resembles an implied preemption argument. In *Cipollone*, the Court specifically limited its preemption analysis to examination of the express preemption clause in the Cigarette Labeling and Advertising Act. *See Cipollone*, 112 S.Ct. at 2618 ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' . . . 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."); *see also CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

After *Cipollone*, a number of federal circuit courts have questioned the propriety of an implied preemption analysis when presented with an express preemption clause. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521-22 (11th Cir. 1994); *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993); *Worm v. American Cyanamid Co*, 5 F.3d 744, 747 (4th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.), *cert. denied*, 114 S.Ct. 86

decision that propeller guards should not be *regulated* does not reflect an intention to foreclose state tort liability. First, as noted above, the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business. *See Goodyear*, 486 U.S. at 185-86 (stating that the defendant "may choose to disregard" the safety standards imposed by state tort law and pay damages as they are awarded). Second, the Propeller Subcommittee Report mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states. *See* Report of the Propeller Guard Subcommittee, at 4-5. Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller guards should not be regulated, its preemptive effect would not necessarily include state common law.

In addition, we believe that the savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept

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(1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir.), *cert. denied*, 114 S.Ct. 291 (1993); *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 974 (1993).

For purposes of this discussion, however, we address Mercury's implied preemption claims.

that a state may nevertheless award tort damages for unsafe products. *Cf. Silkwood*, 464 U.S. at 256. While uniformity is indeed one of the goals of the Act, it is not to be obtained at all costs, as evidenced by the exception for non-identical state standards when necessary to meet "uniquely hazardous conditions" within the state. *See* § 4306; *see also* 1971 U.S.C.C.A.N. at 1341. The broad language of § 4311(g), while not free from ambiguity, directs that Moore's claims be preserved.

We recognize that our holding conflicts with the four courts that have considered the preemption of state law tort actions based on the failure to install propeller guards. *See Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991); *Farmer v. Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill.App. Ct. 1992); *but see Mulhern*, 432 N.W.2d at 135 (holding that in suit against manufacturer for defective throttle which met federal standards, § 4306 does not expressly or impliedly preempt state tort claims because the Act and regulations are "only *minimum* safety standards which do not provide private tort remedies"); *Rubin*, 487 So. 2d at 363 (in suit against manufacturer for defective seat that met federal standards, rejecting idea that the Act "is intended to be the exclusive basis for a boat manufacturer's liability for damages under maritime or civil law").[11] However, in

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[11] We also note that the Alabama courts have entertained suits like the instant one under Alabama tort law, although without expressly addressing the issue of preemption. *See Veal v. Teleflex, Inc.*, 586 So.2d 188 (Ala. 1991); *Beech v. Outboard*

light of the Supreme Court's apparent turn to stricter preemption analysis, *see supra* note 10, we do not find their reasoning persuasive. *See also* Anderson & Famulari, *supra* note 4, at 105 (arguing that the Coast Guard regulations are minimum standards, leaving room for state common-law claims requiring additional or stricter safety measures or equipment).

We hold that Moore's state law tort claims are not preempted by the Federal Boat Safety Act. Therefore we reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings.

John Cornyn
Justice

OPINION DELIVERED: April 20, 1994

Marine Corp., 584 So.2d 447 (Ala. 1991); *Elliott v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 756 (1991) (applying Alabama law in a diversity suit).

IN THE SUPREME COURT OF TEXAS

No. D-3997

SHANNON MOORE, INDIVIDUALLY AND BY NEXT FRIEND, DONAL R. MOORE, PETITIONERS

v.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, INDIVIDUALLY AND D/B/A MERCURY OUTBOARD MOTORS AND/OR MERCRUISER; AND VIVIAN INDUSTRIAL PLASTICS, INC., INDIVIDUALLY AND D/B/A V.I.P. BOATS, RESPONDENTS

Argued February 15, 1994

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

CHIEF JUSTICE PHILLIPS dissents, joined by JUSTICE HIGHTOWER and JUSTICE HECHT.

I respectfully dissent. Although I agree that state law tort claims based on the failure to install a propeller guard are not expressly preempted by the Federal Boat Safety Act, I believe that they are impliedly preempted. Therefore, I would affirm the judgment of the court of appeals.

Because state jury damage awards can have an indirect regulatory effect, we must examine whether Moore's

claim that the boat was defectively designed because it lacked a propeller guard is nevertheless impliedly pre-empted because it conflicts with the purposes of the Act and its regulatory scheme. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959))). Moore concedes that judicial imposition of liability for failing to install propeller guards may force manufacturers to install such guards. She candidly concedes as well that the decision to install guards may also expose manufacturers to liability. Either consequence is merely "what we have juries for," she contends; since the Coast Guard has not passed a regulation on the subject of propeller guards, there is no conflict with federal law.

To me, this argument does not accord proper significance to the Coast Guard's affirmative decision to leave this area unregulated. As the Supreme Court has repeatedly held, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983) (emphasis in original); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 422 (1986); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Bonito Boats, Inc.*

v. Thunder Craft Boats, Inc., 489 U.S. 141, 151-52 (1989); *see also Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 621-22 (2d Cir. 1992); *Baltimore & Ohio Railroad Co. v. Oberly*, 837 F.2d 108, 115 (3d Cir. 1988).

This principle applies here because the Coast Guard made a *policy* decision that a regulation mandating propeller guards is not warranted at this time. *See Puerto Rico*, 485 U.S. at 503-04 (explaining that the quoted language is not meant in an unqualified sense, but rather only applies where a "comprehensive federal scheme *intentionally* leaves a portion of the regulated field without controls") (emphasis added); *cf. Arkansas Electric*, 461 U.S. at 384 (holding that this principle did not apply on the facts because the federal agency did not determine "as a matter of policy" that the given area should be left unregulated); *Toy Manufacturers*, 986 F.2d at 622 (denying preemptive effect to a federal decision not to regulate warning labels, where the agency had made no judgment about the efficacy of or need for a warning label requirement). In this case, the Coast Guard, in addition to adopting the Subcommittee's recommendation that it take "no regulatory action to require propeller guards,"[1]

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[1] The Subcommittee concluded that (1) current propeller guards can be "counter-productive and can create new hazards of equal or greater consequence." (2) no universal design is presently available, making the cost of retrofitting the millions of boats in this country prohibitive, and (3) the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities." *See* National Boating Safety Advisory Council [NBSAC], Report of the Propeller Guard Subcommittee, at 22-24 (Nov. 7, 1989). In a section of the report entitled "Key Points Covered by Verbal Input and Written Materials," the Subcommittee notes that a number of lawsuits have been filed against manufacturers

specifically stated that propeller guards should not be mandated because of the lack of a feasible universal propeller guard and the economic costs that would attend any such requirement. Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services to Mr. A. Newell Garden, Chairman, NBSAC, at 1 (February 1, 1990). Allowing a jury to impose damages on a manufacturer in this context would in effect create a safety standard in direct conflict with the Coast Guard's determination that manufacturers should not be required to install propeller guards[2] and with the Act's goal of uniformity of safety standards. Thus, while Moore's claims are not expressly preempted by § 4306, they are impliedly preempted based on the specific policy decision of the Coast Guard and the policy of uniformity embraced by the Act.

The language of the savings clause complicates, but does not alter, this conclusion. Under implied preemption review, courts do not apply the same presumption against

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for failure to install propeller guards. *Id.* at 4. However, the Subcommittee expresses no opinion on the viability of such suits, and the Coast Guard letter adopting the Subcommittee's recommendations does not refer to such litigation.

[2] Moore argues that the Subcommittee's investigation, while extensive, was not exhaustive, and implies that some of the evidence and expert testimony considered by the Subcommittee actually militated against preemption. Moore contends that a "fact issue" exists concerning the feasibility of propeller guards. However, for purposes of ascertaining the preemptive effect of the Coast Guard's determination that a propeller guard requirement would not be desirable, this Court's estimation of the wisdom of such a decision is irrelevant.

preemption as under express preemption review. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) (" '[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962))); *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) ("[I]n contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights."). In such circumstances, federal courts have not read a savings clause to eviscerate the federal statute. In *International Paper Company v. Ouellette*, the Supreme Court declined to presume that Congress intended to undermine its own statute through a general savings clause. 479 U.S. 481, 494 (1987); *see Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) ("As in *International Paper Co. v. Ouellette*, 'we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.' " (citation omitted)); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1443 n.11 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993) ("[T]he [Supreme] Court has limited a savings clause if it presents 'an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies,' . . . or if it would 'undermine [a] carefully drawn statute.' " (citations omitted)); *Buzzard v.*

Roadrunner Trucking, Inc., 966 F.2d 777, 780-81 n.6 (3d Cir. 1992) ("A savings clause . . . does not preserve state common law actions that subvert federal law.") (citing *Ouellette*); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) ("[I]t is well-established that a savings clause . . . does not 'save' common law actions that would subvert a federal statutory or regulatory scheme."); *Wood v. General Motors Corp.*, 865 F.2d 395, 416 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) ("*Ouellette* belie[s] the supposed principle that a general savings clause precludes a court from looking into implied preemption."); *see also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (where state common-law action was plainly contrary to the purposes of the federal statute, Court was "not free to assume" that such action had been preserved). Nothing in the legislative history of the Act evinces any intent to allow state law claims that clash with the purposes of the Act and its regulatory scheme.[3]

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[3] Thus this case is distinguishable from *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 256 (1984), where the Court held that state tort damages for nuclear safety violations did not conflict with laws vesting the federal government with the exclusive authority to regulate nuclear safety. The Court found direct evidence in the legislative history of Congress' intent to allow the "tension" between these two principles. It did not lay down a general rule that general savings clauses reflect a congressional sanction of the tension between federal regulation and clashing state products liability law. *See Wood*, 865 F.2d at 413.

Implied preemption review is foreclosed *only* where an express preemption clause "provides a 'reliable indicium of congressional intent with respect to state authority.' " *Cipollone*, 112 S. Ct. at 2618 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)); *see Toy Manufacturers*, 986 F.2d at 623-24; *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), *cert. denied*, 114 S. Ct. 300 (1993); *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 897-98 (W.D. Ky. 1993); *Covey v. Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1139-40 (E.D.N.Y. 1992); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570, 575-76 (Tex. App. – Dallas 1993, no writ); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865, 870-71 (Wis. Ct. App. 1993). *But see Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir.), *cert. denied*, 114 S. Ct. 86 (1993) (holding that existence of express preemption clause precludes reliance on implied preemption doctrine, without determining whether provision constituted a "reliable indicium of congressional intent"); *American Agriculture Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992) ("Only if a statute is devoid of explicit preemptive language may we resort to either variant of implied preemption.").[4] I find no such intent here.

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[4] This language in *Cipollone* reaffirms the standard principle that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also Gills*, 829 F. Supp. at 897 ("The Supreme Court [in *Cipollone*] broke no new ground with that discussion."). It is axiomatic that Congress may fail to clearly and unambiguously express its intent in a preemption clause.

For example, courts have construed a very similar statutory scheme under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* ["NTMVSA"], as effecting preemption. Section 1392(d) of that Act, entitled "Supremacy of federal standards," provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

Section 1397(k), entitled "Continuation of common law liability," provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Four circuit courts have considered the preemptive effect of NTMVSA on state common-law suits against auto manufacturers for failing to install air bags. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert denied*, 494 U.S. 1065 (1990); *Wood v. General*

Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). As did the Coast Guard with respect to propeller guards, Congress and the Secretary of Transportation made a conscious decision not to mandate air bags at the time of these cases. Thus, under the regulations manufacturers were given the choice to install either air bags *or* seat belts. *See Pokorny*, 902 F.2d at 1123; *Wood*, 865 F.2d at 399. After determining under an express preemption review that § 1392(d) and § 1397(k), taken together, did not indicate an unmistakable intent to preempt state tort claims, see *Wood*, 865 F.2d at 401; *Pokorny*, 902 F.2d at 1121; *Taylor*, 875 F.2d at 825; *Kitts*, 875 F.2d at 789, these courts all held the Act to be facially ambiguous as to whether Congress meant to preserve state tort claims that had the effect of conflicting with the regulatory scheme. *See Wood*, 865 F.2d at 401 ("The difficulty arises because section 1392(d) (the preemption clause) and section 1397(c) (the savings clause) send conflicting messages in these particular circumstances.").[5] Therefore, they proceeded to an implied preemption review,[6] and determined that damage awards based on a failure to install

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[5] Section 1397(c) was redesignated as § 1397(k) in a 1988 amendment to the NTMVSA.

[6] A panel of the Eleventh Circuit recently reexamined the preemption analysis it employed in *Taylor*, in light of the Supreme Court's decision in *Cipollone*. *See Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994). The court held that under *Taylor*, the NTMVSA did not expressly preempt a state tort law action alleging that a tractor-trailer was negligently designed because it lacked anti-lock brakes. *Id.* at 1521. In a 2 to 1 decision, the court declined to engage in implied preemption analysis on the grounds that §§ 1392(d) and 1397(k) provided a reliable indicium of congressional intent. *Id.* at 1525.

air bags would actually conflict with the Act because they had the effect of creating an air bag requirement, in contravention of the federal desire not to prematurely mandate air bags.[7]

A similar conclusion is warranted in this case. State court damage awards would effectively require boat manufacturers to install propeller guards, in direct contravention of the expressed federal policy against mandating

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[7] In her brief and at oral argument, Moore repeatedly relies on *Dorsey v. Honda Motor Company*, 655 F.2d 650, 654 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982), as holding that air bag cases are not preempted under federal law. However, Moore misconstrues *Dorsey*. *Dorsey* did not involve a failure to install air bags. Moreover, the court's discussion focused on whether under Florida law compliance with federal regulations precluded a finding of recklessness justifying an award of punitive damages, not whether compliance meant such claim was preempted. *Id.* at 656-57. The Fifth Circuit has expressly recognized that the exact issue posed in *Wood* et al. remains undecided by that court. *See Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992).

While some lower court cases hold that air bag or other passive restraint tort claims are not preempted, see, for example, *Garrett v. Ford Motor Co.*, 684 F. Supp. 407, 412 (D. Md. 1987); *Murphy v. Nissan Motor Corp. in U.S.A.*, 650 F. Supp. 922, 929 (E.D.N.Y. 1987); *Gingold v. Audi-NSU-Auto Union*, 567 A.2d 312, 315 (Pa. Super. Ct. 1989), the clear weight of authority supports the opposite position. *See Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303, 304, 304 n.2 (N.Y. App. Div. 1988) (pointing to the "great weight of judicial authority upholding a finding of preemption" in this context); *Gingold*, 567 A.2d at 315 (acknowledging that its holding places it in the minority of courts regarding this issue); Beverly L. Jacklin, Annotation, *Federal Pre-Emption of State Common-Law Products Liability Claims Pertaining to Motor Vehicles*, 97 A.L.R. FED. 853 § 5 (1990 & 1993 Supp.).

such devices.[8] As the Court concedes, a finding of implied preemption essentially comports with the holdings of the few courts that have decided this precise issue, although some of these courts appear to have arrived at a determination of preemption using an express preemption analysis. *See Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. Ct. App. 1992); *see also Toy Manufacturers of America, Inc. v. Blumenthal*, 806 F. Supp. 336, 345-46 (D. Conn.), *aff'd*, 986 F.2d 615 (2d Cir. 1992) (expressing agreement, in dicta, with the holding of *Mowery*); Thomas A. Russell & Mitchell F. Ducey, *Current Topics in the Law of Recreational Boating*, 5 U.S.F. MAR. L.J. 107, 119 (1992) ("As

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[8] I reject Moore's assertion that these cases are distinguishable because they involved an actual federal regulation that placed an affirmative obligation on manufacturers. As discussed above, a federal decision to forgo regulation can have as much preemptive effect as a federal regulation. *See Arkansas Electric*, 461 U.S. at 384. Moreover, these cases focused on the fact that the motor vehicle regulations were meant to provide manufacturers with a "choice." *See Taylor*, 875 F.2d at 827. The Coast Guard's decision not to mandate propeller guards reflects a similar desire to provide manufacturers with a choice in this area. *See Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991).

I acknowledge that § 1392(d) is arguably less broad than § 4306, because § 1392(d) expressly leaves open to state regulation those areas of motor safety not actually regulated by the federal government. However, such a distinction does not affect the validity of the analogy between the issue in the instant case and the issue involved in *Wood* et al., since those cases did not concern areas unregulated by the federal government.

the *Shields* court indicated, it is essential for the sake of uniformity of decision in this area that all courts, federal and state, apply federal law to cases of injuries resulting from propellers.").[9]

Concluding that Moore's claims are impliedly preempted does not leave her without any possibility of recovery. Persons in Moore's situation would still be free to sue the owners and operators of the boat for negligence. *See* S. REP. NO. 248, 92d Cong., 1st Sess. § 10 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1341 ("Th[is] section [on federal preemption] does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern."). Even without a propeller guard, persons are unlikely to suffer serious injuries in the absence of some negligent conduct, either by themselves or someone else. *See* NBSAC, Report of the Propeller Guard Subcommittee, at 23 (Nov. 7, 1989) ("Operator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities.").

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[9] Alabama courts have applied state products liability law to suits based on the failure to install propeller guards. *See Veal v. Teleflex, Inc.*, 586 So.2d 188, 191 (Ala. 1991) (holding that under Alabama tort law there is no cause of action for failure to install propeller guards on pleasure boat outboard motors); *Beech v. Outboard Marine Corp.*, 584 So.2d 447, 450 (Ala. 1991) (same); *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1510 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991) (in a diversity suit, holding that the defendant was not liable under Alabama law for failing to install a propeller guard). However, none of these cases considered the preemption issue, and I would therefore decline to follow them.

I believe Moore's claims that the boat was defective because it lacked a propeller guard are impliedly pre-empted by the Federal Boat Safety Act. Accordingly, I would affirm the judgment of the court of appeals.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

OPINION DELIVERED: April 20, 1994

THE SUPREME COURT OF TEXAS

No. D-3997

SHANNON MOORE, INDIVIDUALLY AND BY NEXT FRIEND, DONAL R. MOORE, PETITIONERS

v.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, INDIVIDUALLY AND D/B/A MERCURY OUTBORAD MOTORS AND/OR MERCRUISER; AND VIVIAN INDUSTRIAL PLASTICS, INC., INDIVIDUALLY AND D/B/A V.I.P. BOATS, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the Judicial District Court of Brazoria County, Texas, for

further proceedings in conformity with the opinion of this Court;

3) Shannon Moore, Individually and By Next Friend, Donal R. Moore, shall recover from Brunswick Bowling & Billiards Corporation, Mercury Division, Individually and d/b/a Mercury Outboard Motors and/or Mercruiser; and Vivian Industrial Plastics, Inc., Individually and d/b/a V.I.P. Boats, which shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Brazoria County, Texas, for observance.

(Opinion of the Court delivered by Justice Cornyn)
(Dissenting Opinion by Chief Justice Phillips joined by Justice Hightower and Justice Hecht)

April 20, 1994

* * *

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 22, 1994

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RE: Case No. D-3997

Style: SHANNON MOORE, INDIVIDUALLY AND BY NEXT FRIEND, DONAL R. MOORE v. BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, INDIVIDUALLY AND DBA MERCURY OUTBOARD MOTORS AND/OR MERCRUISER; AND VIVIAN INDUSTRIAL PLASTICS, INC., INDIVIDUALLY AND DBA V.I.P. BOATS

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause. Petitioners' conditional motion to extend time to file more

comprehensive response to respondent's motion for rehearing is dismissed as moot.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy

APPENDIX B

Judgment affirmed and Opinion filed May 13, 1993

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-91-00427-CV

SHANNON MOORE, Individually and by Next Friend, DONAL R. MOORE, Appellants

V.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER, and VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, Appellees

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On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 88-C-1888-1

OPINION

Shannon Moore and her next friend, Donal R. Moore (the plaintiffs or the appellants), appeal from summary judgment granted in favor of Brunswick Bowling & Billiards Corporation, Mercury Division, Individually and d/b/a Mercury Outboard Motors and/or Mercruiser, and Vivian Industrial Plastics, Inc., Individually and d/b/a V.I.P. Boats (the defendants or the appellees). The sole point of error raised by the appellants is that the trial court erred in granting summary judgment based on the

doctrine of federal preemption pursuant to the Federal Boat Safety Act. We affirm.

While swimming in a river, Shannon Moore was injured when she was struck by the propeller of a motorboat. The motorboat was manufactured by V.I.P. and included a Mercury motor and drive unit. The motor unit did not have a propeller guard of any kind. The appellants filed suit against the boat's owners and the operator, and later joined Mercury as a products liability defendant under both negligence and strict liability theories. V.I.P. was sued under strict liability theories. The foundation of the appellants' claims against the appellees is that during the manufacture of the motor, Mercury failed to incorporate a propeller guard on its motor unit.

The appellee, Mercury, moved for summary judgment on the grounds that the Federal Boating Safety Act of 1971, 46 U.S.C.A. §§ 4301-4311 (West 1984) (FBSA), preempted any right to the appellants' common-law products liability or negligence causes of action for defective design, manufacture, or marketing. The trial court granted Mercury's motion, and also concluded that the preemption issue was dispositive of the claims against V.I.P. as well. The trial court granted the appellees' motion for severance, whereupon the summary judgment became final for the purposes of appeal.

Summary judgment is proper for a defendant if it conclusively establishes all elements of its affirmative defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The movant must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

MMP, Ltd. v. Jones, 710 S.W.2d 59, 60 (Tex. 1986). The issue of federal preemption is a question of law for the court that can serve as a proper basis for summary judgment. *See Cathey v. Metropolitan Life Ins. Co.*, 764 S.W.2d 286, 293 (Tex. App. – Houston [1st Dist.] 1988), *aff'd*, 805 S.W.2d 387, 388 (Tex.), *cert. denied*, 111 S.Ct. 2855 (1991) (statutory and common-law claims preempted by ERISA). If a defendant establishes its right to summary judgment by conclusively proving federal law preempts the plaintiff's claim, the plaintiff can defeat summary judgment only by showing that federal preemption *does not* apply. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

The doctrine of preemption has been discussed recently by the Supreme Court in the context of a common-law claim against certain cigarette manufacturers. *See Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). In *Cippollone* [sic], the Court emphasized that, pursuant to the supremacy clause of the Constitution, any state law conflicting with federal law is without effect. *Id.* at 2617. Nevertheless, the threshold assumption in our analysis is that the historic police powers of the state are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. *Id.* at 2617. Thus, to determine whether a claim is preempted, a court must examine congressional intent. *Id.* at 2617-18.

A federal statute may preempt state law (1) explicitly, (2) impliedly, where federal legislation occupies the entire field of regulation and leaves no room for state law, or (3) where there is an actual conflict between state law and a federal statute such that the state law acts as an obstacle to the objectives of Congress. *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 491-92 (1987); *see English v. General Elec. Co.*,

495 U.S. 72 (1990). Federal regulations can preempt state law just as completely as federal statutes. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985). Additionally, when Congress has included in the legislation a provision explicitly addressing preemption, and that provision provides a reliable indication of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state law from the substantive provisions of the legislation. *Cipollone*, 112 S.Ct. at 2618.

Two provisions of the FBSA are relevant to our analysis. The first addresses federal preemption and states:

> Unless permitted by the Secretary under section 4305 of this title [46 U.S.C.S. § 4305], a State or political subdivision may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title [46 U.S.C.S. § 4302].

46 U.S.C.A. § 4306 (West 1984). Section 4311(g), the "savings clause," provides:

> Compliance with this chapter [46 U.S.C.S. §§ 4301 *et seq.*] or standards, regulations, or orders prescribed under this chapter [46

> U.S.C.S. §§ 4301 *et seq.*] does not relieve a person from liability at common law or under State law.

46 U.S.C.A. § 4311(g) (West 1984).

The United States Coast Guard has been delegated the exclusive authority to establish safety regulations. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 756 (1991). Pursuant to that authority, the Coast Guard decided that propeller guards should not be required on recreational watercraft.[1] This action by the Coast Guard was a decision not to regulate and has the same legal consequence as if the Coast Guard had issued a safety standard declaring that the states are prohibited from adopting a regulation requiring propeller guards on recreational boats. *Mowery v. Mercury Marine, Division of Brunswick Corp.*, 773 F.Supp. 1012, 1016 (N.D. Ohio 1991). A federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision

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[1] Pursuant to the provisions of the Act, the Coast Guard directed the National Boating Safety Advisory Council to examine the feasibility of propeller guards designed to prevent accidents. After the study, which included public hearings, the National Boating Safety Board recommended that the Coast Guard take no action to require propeller guards because they decrease an operator's ability to maintain control over the boat at "normal" speeds, increase the probability of striking a body in the water, and create a possibility of causing greater injury. As a result, the Coast Guard declined to issue any regulations mandating the use of propeller guards. *Letter from Robert T. Nelson, Rear Admiral U.S. Coast Guard, Chief, Office of Navigation and Waterway Services to Mr. A. Newell Garden, Chairman NBSAC*, at 1 (Feb. 1, 1990); 46 U.S.C.A. § 4302(4) (West 1984).

to regulate. *Id.* (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 385 (1983)); *see also Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D. Ga. 1991).

The purpose of section 4306 is to standardize regulations applicable to the manufacture of boats by precluding states from adopting requirements that are not identical or that conflict with federal standards. *See Farner v. Brunswick Corp.*, 607 N.E.2d 562, 566 (Ill. App. Ct. 1992); *Shields*, 776 F.Supp. at 1581; *Mowery*, 773 F.Supp. at 1014. A state jury award of damages based on a defendant's alleged failure to equip its product with such a guard would be tantamount to recognition of a state requirement that they be installed. *Farner*, 607 N.E.2d at 567; *Mowery*, 773 F.Supp. at 1016; *see also MacMillan v. Redman Homes Inc.*, 818 S.W.2d 87, 95 (Tex. App. – San Antonio 1991, writ denied). Furthermore, we also conclude that the use of the word "law" in section 4306 further evidences Congress' intent that no common-law tort action be maintained based on the lack of a propeller guard. *See Farner*, 607 N.E.2d at 567. We find that Congress intended to preempt a common-law tort action and the action in this case is thus barred under section 4306.

The appellants also argue that the FBSA's "savings clause," 46 U.S.C.A. § 4311(a), allows them to assert their claim under state common law. We reject the appellants' contention. The purpose of the savings clause is to assure that, by merely complying with the standards promulgated under the FBSA, a manufacturer will not have a *per se* defense to liability in a products liability action. *Farner*, 607 N.E.2d at 567.

The appellants rely on *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App.), *review denied*, 436 N.W.2d 31 (Wis. 1988), and *Rubin v. Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App.), *review denied*, 500 So.2d 543 (Fla. 1986), in support of their position. However, these cases are readily distinguishable from this case. In *Mulhern*, the court affirmed a decision to hold a manufacturer liable under state law for injuries caused when a throttle installed by it on an outboard motor caused the boat to lunge forward, thus throwing the plaintiff overboard into the motor's propeller. 432 N.W.2d at 134-36. In *Rubin*, the court reversed summary judgment for the defendant where the plaintiff was injured when a boat seat came loose upon the boat's impact with a fixed channel marker. 487 So.2d at 360. Both *Mulhern* and *Rubin* interpret the savings clause to prevent a manufacturer from using compliance with the minimum safety standards set forth in the FBSA as a defense against liability for defectively designed products that are *actually installed*. *Mowery*, 773 F.Supp. at 1017; *see Farner*, 607 N.E.2d at 567.

This case is also distinguishable from a recent decision from this Court on a similar issue, *Ramsey v. Lucky Stores, Inc.*, No. 01-90-00741-CV (Tex. App. – Houston [1st Dist.], March 18, 1993, n.w.h.) (not yet reported). *Ramsey* was a products liability lawsuit against the seller of a lifejacket. In finding for the defendants, the jury found the seller had adequately warned and instructed consumers on the use of the product and that the product was fit for the ordinary purpose for which it was intented [sic]. *Id.*, slip op. at 2. We affirmed the findings of the jury. *Id.* The appellees raised the cross-point that the appellants' cause of action against them was preempted by the

FBSA. *Id.*, slip op. at 25. In examining whether the FBSA preempted products liability actions against sellers of products, we found that the product defect alleged in this case did not pose an actual conflict with the regulatory act. *Id.*, slip op. at 26. Because of this, we held that the savings clause found in the FBSA permitted an action against the *seller* of the product for failure to provide warnings in addition to those required by the statute. *Id.* This is not the issue we address here.

In the case before us, to allow a jury to conclude that the appellees' "failure" to provide a propeller guard constitutes a design defect would, in effect, grant to a single jury a regulatory power explicitly denied to all state legislatures. *Mowery*, 773 F.Supp. at 1017.

We overrule the appellants' point of error.

We affirm the judgment of the trial court.

/s/ Lee Duggan, Jr.
Lee Duggan, Jr.
Justice

Justices Dunn and O'Connor also sitting.

Justice O'Connor dissenting.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered May 13, 1993
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

[SEAL]

In The
Court of Appeals
For the
First District of Texas

NO. 01-91-00427-CV

SHANNON MOORE, Individually and by Next Friend, DONAL R. MOORE, Appellants

V.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER and VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, Appellees

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On Appeal from the 23rd District court
Brazoria County, Texas
Trial Court Cause No. 88-C-1888-1

DISSENTING OPINION

I dissent. The issue before this Court is whether the trial court properly applied the doctrine of federal preemption. I would find that it did not and reverse.

Federal preemption.

The supremacy clause of the United States Constitution gives Congress the power to preempt state law. U.S.

Const. art. VI, cl. 2; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208, 105 S.Ct. 1904, 1909 (1985). Under that clause, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. *Wisconsin Pub. Intervenor v. Martier*, 111 S.Ct. 2476, 2481 (1991). To determine if Congress has preempted a certain law, we start with the assumption that the historic police powers of the States are not to be superseded by a federal act unless it is a clear and manifest purpose of Congress. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947).

Congress may take unto itself all regulatory authority over a field or share the task with the States. *Rise*, 331 U.S. at 230, 67 S.Ct. at 1152. Absent express preemption, there is a strong presumption against preemption. *Cipollone*, 112 S.Ct. at 2618 (1992). Courts should not lightly infer preemption. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491, 107 S.Ct. 804, 811 (1987). If, however, federal legislation is sufficiently comprehensive to infer that Congress left no room for supplementary state regulations, we will presume federal law preempts state law. *Id.* In addition to express and implied preemption, a state law is invalid if it actually conflicts with a federal statute. *Ouellette*, 479 U.S. at 491, 107 S.Ct. at 811.

Thus, a federal statute may preempt state law (1) explicitly, (2) implicitly, by occupying the entire field of regulation and leaving no room for state law, or (3) where there is an actual conflict between state law and a federal statute such that the state law acts as an obstacle to the objectives of Congress. *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152.

The Boating Safety Act

Our task is to determine if, by the Boating Safety Act, Congress intended to take all the regulatory authority over the field of recreational boats or merely to waive it and share the area with the states. The Boating Safety Act's preemption clause, codified at 46 U.S.C. § 4306 (1987), provides:

> Unless permitted by the Secretary under section 4305 of this title, a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment that is not identical to a regulation prescribed under section 4302 of this title.[1]

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[1] Compare the preemptive language in the Boating Safety Act to that in the airline Deregulation Act, 49 U.S.C. § 1305(a)(1) (1987), which prohibits the states from enforcing any law "relating to rates, routes, or service," of any air carrier. In *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2037 (1992), the Supreme court held that the phrase "relating to" in 49 U.S.C. app. § 1305(a)(1), was the key phase and expressed a broad preemption purpose. There is no similar "key phrase" in the preemptive language of the Boating Safety Act.
Also compare the preemptive language on the Boating Safety Act to that in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334 (1965) (Cigarette Labeling Act), which has two provisions regarding preemption:

> (a) No state statement relating to smoking and health, other than the statement required by section 4 of this Act shall be required on any cigarette package.
> (b) No statement relating to smoking and health, based on smoking and health shall be *imposed under State law* with respect to the advertising of any cigarette packages of which labeled in conformity with the provisions of this Act.

Express preemption

The Boating Safety Act does not expressly preempt state tort law. *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130, 135 (Wis.1988). The purpose of the preemption clause "is to standardize regulations applicable to the manufacture of boats by precluding states from adopting requirements that conflict with federal standards." *Rubin v. Brutus Corp.*, 487 So.2d 360, 363 (Fla.Dist.Ct.App.1986), *review denied*, 500 So.2d 543 (Fla.Supp.1986) (the Boating Safety Act did not preempt the application of the state crash-worthiness standards to a boating accident). In fact, the first sentence in the legislative history seems to indicate Congress intended to share authority over recreational boats with the states: "The purpose of the bill is to provide a *coordinated* national boating safety program involving both the federal Government and the States." S.Rep.No 248, 92nd Cong., 1st Sess. (1971) (emphasis added), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333; *cf. Rice*, 331 U.S. at 237, 67 S.Ct. at 1156 (Congress did not foreclose action by the states when it adopted the United States Warehouse Act).[2]

In *Cipollone*, 112 S.Ct. at 2620-21, the Supreme Court held the phrase "imposed under State law" in the Cigarette Labeling Act did not preempt common law causes of action for damages.

[2] To determine whether a claim is preempted, we may examine Congressional intent, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150 (1988). The purpose of the Boating Safety Act is to establish uniform minimum safety standards for boats and associated equipment. S.Rep.No. 248, 92nd Cong., 1st Sess., sec. 5 (1971) *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338; *Mulhern*, 432 N.W.2d at 135.

Implied preemption

The Boating Safety Act does not implicitly preempt state law. To determine if the savings clause left any room for state causes of action, the court must first look to the language of the savings clause. *Ouellette*, 479 U.S. at 492, 107 S.Ct. at 812. The Boating Safety Act's savings clause states that:

> (g) Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve any person from liability at common law or under State law.[3]

46 U.S.C. § 4311(g) (1987). In the legislative history, it explains:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.* Of course, depending on the rules of evidence of the particular judicial forum, such

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[3] Compare the language of the savings clause in the Boating Safety Act to that in the Airline Deregulation Act, 49 U.S.C. § 1506 (1987), which preserves "the remedies now existing at common law or by statute." The savings clause in the Boating Safety Act specifically states that compliance with the standards, regulations, or orders prescribed under the Boating Safety Act does not relieve a person from liability – the very issue in this case.

> compliance may or may not be admissible for its evidentiary value.

S.Rep. No. 248, 92nd Cong., 1st Sess., sec. 40 (1971) *reprinted in* 1971 U.S.C.C.A.N. at 1352 (emphasis added). The savings clause leaves room for state law, and the Boating Safety Act does not occupy the entire field of regulation.

This savings clause in the Boating Safety Act is similar to the one in the National Traffic and Motor Vehicle Safety Act of 1966,[4] which also states that compliance with the Act does not exempt persons from liability under the common law. 15 U.S.C. § 1397(c) (1987). That provision has been construed to mean that compliance with regulations governing manufacturing does not necessarily relieve the manufacturer of liability under general tort law. *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir.1981). Compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's conduct reasonable. RESTATEMENT (SECOND) OF TORTS § 288C (1965). The reasoning in the *Dorsey* case is persuasive for a similar construction of the Boating Safety Act.

Even if we assume Congress intended to dominate the field of boating safety standards, the savings clause negates the inference that Congress "left no room" for state causes of action. *See, e.g., Ouellette*, 479 U.S. at 492, 107 S.Ct. at 812 (savings clause in the Clean Water Act that said, "nothing in this section limits an injured party's right," did not save cause of action in other sections);

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[4] 15 U.S.C. § 1381 (1987).

Rubin, 487 So.2d at 363 (the Boating Safety Act was held not to be the exclusive ground for manufacturer's liability). Comparing the language of the Boating Safety Act's savings clause to that in the savings clause of the Clean Water Act, I note the language in this savings clause applies to the entire chapter. *Ouellette*, 479 U.S. at 492, 107 S.Ct. at 812.

Both *Mulhern* and *Rubin* interpret the savings clause to prevent a manufacturer from using compliance with the minimum safety standards in the Boating Safety Act as a defense against liability for defectively designed products that are actually installed. *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991).

In *Mulhern*, the court affirmed a decision to hold a manufacturer liable under state law for injuries caused when a throttle installed on an outboard motor, which was within the Boating Safety Act's standards, caused the boat to lunge forward throwing the plaintiff overboard into the propeller. 432 N.W.2d at 134-36. In *Rubin*, the court reversed the summary judgment for the defendant where the plaintiff was injured when a boat seat, which was also within the Boating Safety Act's standards, came loose upon the boat's impact with a fixed channel marker. 487 So.2d at 360.

Recently, the Supreme Court articulated a test to determine if common-law actions are implicitly preempted. The Court said we must make a central, straightforward inquiry asking whether the legal duty, the predicate of the damage action, satisfies the express terms of the preemption clause, giving the clause a narrow

reading. *Cipollone,* 112 S.Ct. at 2620 (in the Cigarette Labelling Act, the language narrowly construed was "requirement or prohibition . . . imposed under State law").

Here, the preemptive language we should narrowly construe is: "a State may not establish . . . or enforce a law . . . that is not identical to a regulation prescribed under section 4302 of this title." Section 4302 of the Boating Safety Act states that the Secretary "may" prescribe regulations. There is no regulation prescribed under section 4302 of the Act relating to propeller guards. Thus, giving the preemptive clause a narrow reading, I would conclude that a common-law action for damages does not conflict with any regulation in the Act.

Preemption by conflict

Finally, the Boating Safety Act does not preempt by conflict. There is no conflict between state law and the Boating Safety Act such that the state law would be an obstacle to the objectives of Congress. The Boating Safety Act does not speak to the issue of the propeller guards.

Preemption by refusal to act

Mercury contends the Boating Safety Act preempts this lawsuit because the Coast Guard officially decided against taking any action to require propeller guards. Mercury contends the Coast Guard's decision not to take any action is the equivalent to a finding that propeller guards are prohibited.

In 1988, the Coast Guard referred the issue of the feasibility of propeller guards to the National Boating Safety Advisory Council. (NBSAC) to study, as required by 46 U.S.C. § 4302(c)(4) (1987). The NBSAC referred the issue to a subcommittee comprised of five individuals. The subcommittee held four days of hearings in three cities and heard presentations by 10 individuals, including a representative of mercury, Mercury's experts who had testified at a lawsuit for Mercury, and the plaintiff's lawyer in that suit. As a result of the hearings, the NBSAC recommended the Coast Guard take no action to require propeller guards. The NBSAC report stated, according to the date currently available, propeller guards are not feasible for recreational boats because they: (1) decrease an operator's ability to maintain control over the boat at "normal" speeds; (2) increase the probability of striking a body in the water; and (3) create a possibility of causing greater injury.

The NBSAC made the following recommendation: "The U.S. Coast Guard should take no regulatory action to require propeller guards." *Report of the Propeller Guard Subcommittee* at 2. The Coast Guard adopted the NBSAC recommendation to take no regulatory action as its official policy. *Letter from Robert T. Nelson, Rear Admiral U.S. Coast Guard, Chief, Office of Navigation and Waterway Services to Mr. A. Newell Garden, Chairman, NBSAC,* at 1 (Feb. 1, 1990). In the letter announcing its decision to take no action, the Coast Guard did not adopt the rationale of the subcommittee (that propeller guards decrease an operator's ability to maintain control over the boat at "normal" speeds, increase the probability of striking a body in the

water, and create a possibility of causing greater injury). Instead, it explained:

> *Coast Guard Position.* The regulatory process is very structured and stringe [sic] regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Mercury contends the Coast Guard's adoption of the recommendation has the same legal consequence as if the Coast Guard had issued a safety standard prohibiting the states from adopting a regulation requiring propeller guards on recreational boats. Mercury relies on *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990), *Mowery*, 773 F.Supp. at 1016, and *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581 (M.D. Ga. 1991). All three cases hold the failure to adopt a regulation acts to prohibit any state action, even under tort law. I would decline to follow *Elliott*, *Mowery*, and *Shields*.

Normally, regulation does not preempt state authority unless it declares its intent to do so with some specificity. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 1426 (1987). If an agency does not speak to the question of preemption, the courts are disinclined to hold the agency intended to preempt. *Hillsborough County, Fla. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 718, 105 S.Ct. 2371, 2377 (1985).

In addition, the courts have been reluctant to draw inferences from a legislative body's failure to act. *Schneidewind*, 485 U.S. at 306, 108 S.Ct. at 1153-54; *see, e.g., Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 n.11, 89 S.Ct. 1794, 1802 n.11 (1969) (unsuccessful attempt at legislation is not a good guide to legislative intent); *Dutcher v. Owens*, 657 S.W.2d 948, 950 (Tex.1983) (court would not consider bills that did not pass as evidence of the legislature's intent). The same rule should apply to a regulatory body's failure to adopt a regulation to require propeller guards.

The Coast Guard could have made one of at least three findings: (1) propeller guards should not be used on motorboats; (2) propeller guards should be used on motorboats; or (3) at this time, there is not enough information to take any regulatory action on the issue of whether propeller guards should be used on motor boats. Mercury contends that the results of the first and third option are the same: the decision to take no action is the same as the decision that propeller guards should not be used. I disagree.

In sustaining Mercury's claim of preemption of suits for failure to include propeller guards, which is not even regulated by the Coast Guard, it will inevitably lead to the conclusion that victims of all sorts of pleasure-boating accidents involving all types of defects are without any remedy. Today's holding will prevent any common-law tort litigation relating to boats.

We should adopt the reasoning of *Mulhern* and *Rubin*, sustain the Moores' sole point of error, and reverse and remand for a new trial.

/s/ Michol O'Connor
MICHOL O'CONNOR
Justice

Justices Duggan an Dunn also sitting.

Publish. TEX.R.APP.P 90.

Judgment rendered and opinion delivered May 13, 1993
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

[SEAL]

Court of Appeals

First District of Texas

COPY OF JUDGMENT

SHANNON MOORE, Individually and by Next Friend, DONAL R. MOORE, APPELLANTS

NO. 01-91-00427-CV

V.

BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER and VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, APPELLEES

Appeal from the 23rd District Court of Brazoria County, Texas, (Tr. Ct. No. 88-C-1888-1). Opinion delivered by Justice Duggan Justices Dunn and O'Connor also sitting. Justice O'Connor dissenting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on March 13, 1991. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things affirmed.

It is further, **ORDERED** that the appellants, **SHANNON MOORE**, Individually and by Next Friend, **DONAL R. MOORE,** and their surety, **UNIVERSAL SURETY OF AMERICA,** joined and severally, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Duggan, Dunn, and O'Connor.

Judgment entered May 13, 1993

APPENDIX C

NO. 88-C-1888

SHANNON MOORE, Individually and by Next Friend, DONAL R. MOORE	§	IN THE DISTRICT COURT OF
VS.	§	
BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER; VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P BOATS; ROLAND BADERTSCHER; CHARLES WEST POE; and REBECCA (BADERTSCHER) GIAMMALU	§	BRAZORIA COUNTY, TEXAS
	§	23RD JUDICIAL DISTRICT

INTERLOCUTORY SUMMARY JUDGMENT

BE IT REMEMBERED that on the 11th day of September, 1990, defendant BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, individually and d/b/a MERCURY OUTBOARD MOTORS &/or MERCRUISER, filed its Motion for Summary Judgment and duly notified all parties of same. The Court heard the arguments of counsel on the 15th day of October, 1990, and after due consideration of the arguments and briefs supplied by counsel, announced in Open Court on Monday, February 4, 1991, that said Motion for Summary Judgment should, in all things, be granted on the ground that the doctrine of Federal Preemption bars Plaintiffs' cause of action against said Defendant.

It was also noted in Open Court that the cause of action asserted by Plaintiffs against Defendant VIVIAN INDUSTRIAL PLASTICS, INC., Individually & d/b/a V.I.P. BOATS is identical at law to the cause of action asserted by Plaintiffs against defendants BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARD MOTORS &/or MERCRUISER, upon which Summary Judgment is hereby being granted.

Plaintiffs, SHANNON MOORE, Individually & b/n/f, DONAL R. MOORE, through their counsel, agreed in Open Court on February 4, 1991, that, in the interest of judicial economy, the Summary Judgment should include Defendant VIVIAN INDUSTRIAL PLASTICS, INC., Individually & d/b/a V.I.P. BOATS, without the necessity of said defendant having to file an identical motion for Summary Judgment on the Federal Preemption question, obtain a hearing on same, and obtain an identical ruling in that the Court could treat the Motion for Summary Judgment of BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARDS MOTORS &/or MERCRUISER, as also being filed by VIVIAN INDUSTRIAL PLASTICS, INC., Individually & d/b/a V.I.P. BOATS.

Said announcement was made with the understanding that Plaintiffs did not concede to the correctness of the granting of the Motion for Summary Judgment, and that they would preserve all their rights to object, except, and appeal said ruling of the Court.

It is, accordingly, ORDERED, ADJUDGED, and DECREED that an Interlocutory Summary Judgment is

Granted in favor of Defendants (1) BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION, Individually and d/b/a MERCURY OUTBOARDS MOTORS &/or MERCRUISER, and (2) VIVIAN INDUSTRIAL PLASTICS, INC., Individually & d/b/a V.I.P. BOATS, in that Plaintiffs, SHANNON MOORE, Individually & b/n/f, DONAL R. MOORE, shall take nothing as to said Defendants.

It is, further ORDERED, ADJUDGED, and DECREED that all costs of Court incurred to date shall be carried by the case and taxed in accordance with the disposition of the case.

SIGNED this 13th day of March, 1991.

/s/ Neil Caldwell
JUDGE PRESIDING

NO. 88-C-1888

SHANNON MOORE, Individually and by Next Friend, DONAL R. MOORE	§	IN THE DISTRICT COURT OF
VS.	§	BRAZORIA COUNTY, TEXAS
BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER; V.I.P, INC., Individually and d/b/a V.I.P. BOATS; VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P BOATS; BOAT SUPERSTORE, INC.; ROLAND BADERTSCHER; CHARLES WEST POE; and REBECCA BADERTSCHER	§	23RD JUDICIAL DISTRICT

ORDER GRANTING MOTION FOR SEVERANCE

BE IT REMEMBERED that that [sic] on the 13th day of March, 1991, came on for review the Motion to Sever of defendants (1) BRUNSWICK BOWLING & BILLIARDS CORPORATION MERCURY DIVISION individually and d/b/a MERCURY OUTBOARD MOTORS and/or MERCRUISER, and (2) VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, and the Court and, after considering same, the Court was of the opinion that sane should be, in all things, granted.

It is, accordingly, ORDERED that the causes of action asserted by plaintiffs, SHANNON MOORE, Individually & b/n/f, DONALD R. MOORE, against defendants (1) BRUNSWICK BOWLING & BILLIARDS CORPORATION,

MERCURY DIVISION individually and d/b/a MERCURY OUTBOARD MOTORS &/or MERCRUISER, and (2) VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, and the Court and Interlocutory Summary Judgment granted said defendants shall be severed, and shall be carried under Cause No. 88-C-1888-A from this day forward.

It is further ORDERED that the following documents shall constitute the documents in said cause:

(1) Plaintiffs' Third Amended Original Petition, which is plaintiffs' most recent petition;

(2) Defendants, Brunswick Bowling & Billiards Corporation, Mercury Division, Individually & d/b/a Mercury Outboard Motors &/or Mercruiser's First Amended Original Answer, which is said defendant's most recent answer;

(3) Original Answer of Defendant, Vivian Industrial Plastics, Inc., which is said defendant's most recent answer;

(4) Brunswick's Motion for Summary Judgment and supporting authorities for same;

(5) Plaintiffs' Response to Brunswick's Motion for Summary Judgment and supporting authorities for same; and

(6) The Interlocutory Order Granting Summary Judgment granted herein.

It is further ORDERED that, as an Interlocutory Summary Judgment has been granted in said cause, and there are not further issues remaining between plaintiffs, SHANNON MOORE, Individually & b/n/f, DONALD R. MOORE,

against the severed defendants, (1) BRUNSWICK BOWLING & BILLIARDS CORPORATION, MERCURY DIVISION individually and d/b/a MERCURY OUTBOARD MOTORS &/or MERCRUISER, and (2) VIVIAN INDUSTRIAL PLASTICS, INC., Individually and d/b/a V.I.P. BOATS, the Summary Judgment shall be final.

SIGNED this 13th day of March, 1991.

/s/ Neil Caldwell
JUDGE PRESIDING